IN THE

Supreme Court of the United States

No. 76-1605

SECURITY MUTUAL CASUALTY COMPANY,
Petitioner,

vs.

CENTURY CASUALTY COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Now comes Security Mutual Casualty Company, hereinafter referred to as "Petitioner," and respectfully prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Tenth Circuit entered on January 14, 1977, over the dissent of Chief Judge Lewis, ordering the issuance of a Writ of Mandamus to the District Court, directing the trial judge to halt all further proceedings and enter a judgment in favor of Century Casualty Company, the Respondent herein. The Petition for Rehearing was denied on February 14, 1977, over the dissent of Chief Judge Lewis.

CITATION TO OPINION BELOW.

The order of the United States Court of Appeals for the Tenth Circuit granting the Writ of Mandamus and the denial of the Petition for Rehearing are unpublished as of this date, but are set forth in Appendix A and B to this Petition.

STATEMENT OF JURISDICTIONAL GROUNDS.

The date of the order directing the issuance of a Writ of Mandamus is January 14, 1977.

The denial of the Petition for Rehearing is dated February 14, 1977.

The statutory provision conferring jurisdiction of this Court to review said order is found in 28 U. S. C. 1254.

QUESTION PRESENTED FOR REVIEW.

Whether the Tenth Circuit Court of Appeals can circumvent the intent of Rule 41 and the appellate procedure established by Rule 3 of the Uniform Rules of Appellate Procedure by issuing a Writ of Mandamus after term time and denial of certiorari, to recall its mandate, for the purpose of altering, correcting or modifying the mandate and/or to prevent possible error of the trial court, thereby denying a party of its right to a hearing and appeal.

STATUTES AND RULES INVOLVED.

Rule 21(a) of the Uniform Rules of Appellate Procedure provides:

> "Application for a writ of mandamus or of prohibition directed to a judge or judges shall be made by filing a petition therefor with the clerk of the court of appeals with proof of service on the respondent judge or judges and on all parties to the action in the trial court. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. Upon receipt of the prescribed docket fee, the clerk shall docket the petition and submit it to the court."

Rule 41(a) of the Uniform Rules of Appellate Procedure provides:

> "The mandate of the court shall issue 21 days after the entry of judgment unless the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate shall issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order."

Rule 30 of the Rules of the Supreme Court of the United States provides:

> "The issuance by the court of any writ authorized by 28 U. S. C. 1651(a) is not a matter of right but of sound

discretion sparingly exercised. See the following cases, which are cited by way of illustration only: *Ex parte Bollman and Swartwout*, 4 Cranch 75; *Ex parte Peru*, 318 U. S. 578; *Ex parte Abernathy*, 320 U. S. 219; *Ex parte Hawk*, 321 U. S. 114; *House* v. *Mayo*, 324 U. S. 42; *U. S. Alkali Export Assn.* v. *United States*, 325 U. S. 196; *DeBeers Consol. Mines* v. *United States*, 325 U. S. 212; *Ex parte Betz*, 329 U. S. 672; *Ex parte Fahey*, 332 U. S. 258."

28 U. S. C. 1651(a) provides:

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

STATEMENT OF THE CASE.

The Tenth Circuit Court of Appeals filed its opinion in the captioned matter, reversing the judgment of the lower court, on March 12, 1976, and denied the Petition for Rehearing on April 5, 1976. The mandate issued seven days thereafter, pursuant to Rule 41 of the Uniform Rules of Appellate Procedure. That opinion (Appendix D) is reported at 531 F. 2d 974 (10th Cir. 1976), *cert. den.* ____ U. S. ____, 97 S. Ct. 161, 50 L. Ed. 2d 137 (1976).

The underlying action involved a dispute involving the interpretation of a contract of reinsurance issued by Petitioner in March of 1966. Under the treaty of reinsurance, Petitioner agreed to reinsure a specified portion of Century Casualty's losses under its primary insurance contracts in return for a portion of the premiums. During 1969, Century Casualty insured Anderson Aviation, who was in the business of leasing airplanes to the public. The policy was within the scope of the reinsurance treaty. On September 3, 1969, an Anderson Aviation plane crashed in Blythe, California, killing the pilot and five passengers and destroying the plane. Suit was brought in Arizona on behalf of the passengers against the passengers' employer, the pilot, and Anderson Aviation. Anderson Aviation was held liable on a negligent entrustment theory. The judgment, in the amount of Three Hundred Eighty-Five Thousand Dollars ($385,000.00), plus costs and interest, was affirmed on appeal. *Anderson Aviation Sales Company, Inc.* v. *Perez*, 508 P. 2d 87 (Arizona Appeals 1973).

In the original proceedings in the District Court, the court found, as a matter of fact, which finding was not disturbed on appeal, that Century had breached the reinsurance contract by failing to give notice of the claims or suit until after the judgment and the denial of post-judgment relief. Following

denial of the post-trial motion in the Arizona proceeding, Century, for the first time, notified Petitioner of the loss and requested Petitioner's assistance in securing the appeal bond. Thereafter, Petitioner, subject to a reservation of rights, arranged for the appeal bond, putting up Three Hundred Eight Thousand Dolloras ($308,000.00), (the policy limit and accrued interest), with Anderson Aviation, the primary assured, putting up the balance of Eighty-Two Thousand Dollars ($82,000.00). The judgment was affirmed on appeal and satisfied out of the proceeds of the appeal bond, with both Petitioner and Anderson Aviation indemnifying the surety.

Thereafter, Petitioner filed suit to recover its damages consisting of Three Hundred Eight Thousand Dollars ($308,-000.00), the amount it was required to indemnify the surety and Petitioner's costs and attorneys' fees incurred in conjunction with the Arizona appeal. The District Court entered a judgment in the amount of Three Hundred Forty-Four Thousand, One Hundred Twenty-Seven and 34/100 Dollars ($344,127.34), which was reversed on appeal.

In its opinion, the Appellate Court, after first holding that the notice provision contained in the treaty was a covenant rather than a condition precedent, stated at page 10:

> "Had Security shown any pecuniary injury from Century's failure to give them notice, we believe damages would have been an adequate remedy. Our construction of the contract does not deny the reinsurer the protection it needs, and it does give the reinsured the security and returns for which it paid." (A. 18.)

Its mandate, as set forth in the last paragraph on page 12, stated:

> "We reverse the judgment insofar as it holds Security Mutual is not liable under the reinsurance treaty for the Anderson Aviation judgment. The amount of its liability should be determined under the terms of the reinsurance treaty. Therefore, the judgment for damages is also reversed. Century Casualty has not appealed from the part

> of the judgment declaring that Security Mutual is entitled to terminate the reinsurance treaty, and it will be allowed to stand. We remand with directions to enter judgment consistent with this opinion." (A. 19.)

Following the issuance of the mandate, the trial court, in construing the mandate and allowing Petitioner's motion for an evidentiary hearing to determine its damages sustained by reason of the breach of contract, said this:

> "I think I am prepared to rule at this time and I would like to give you some direction as to where I think the case is right now. I have reread the briefs that were submitted to the Tenth Circuit. The Court has read the Opinion in clear detail and also the Motion for Rehearing and we cannot draw any conclusion as to what the Tenth Circuit meant by their silence in not granting the Motion for Rehearing. It is only one occasion in perhaps a thousand where rehearing is granted. I do not draw any conclusion from the fact they did not grant a rehearing or did not amend their adjudication.
>
> "There are several areas of the slip opinion which was rendered by the Circuit on the 12th of March that I think supports and underscores this Court's view that the amount of damages is still viable in this lawsuit that the plaintiffs are entitled to. On page 8 of the Opinion, the third line from the top, it states:
>
> > "'. . . A treaty is a bi-lateral contract containing mutual covenants. The Security Mutual-Century treaty contains provisions, such as those pertaining to the loss reserves and taxes and to commencement and termination of contract, which appear to be covenants rather than conditions . . . '
>
> "They construe that aspect there, please, that these are merely terms of conditions rather than conditions precedent.
>
> "On page 9:
>
> > "'. . . Applying these rules to the contract before us, we hold the notice provision is a covenant by Century and not a condition precedent to Security's duty to make payment.'

"On page 10, the first full sentence, they state:

> "'. . . Century had as much reason as Security to see that the death claims in Anderson Aviation litigation were properly investigated and defended. Between the two insurors, there was little danger of fraud or imposition. Had Security shown any pecuniary injury from Century's failure to give them notice, we believe damages would have been an adequate remedy . . .'

"The fact that they used a past tense does not lead us to the conclusion that matter has been adjudicated by the appellate court other than if there was a failure to give notice as required and there is found to be a breach of the treaty which we found and any damages that can be established to naturally flow from the breach of the covenant are recoverable. That is how we interpret the Opinion.

"The last paragraph in the Opinion states:

> "'We reverse the judgment as it holds Security Mutual is not liable under the reinsurance treaty for the Anderson Aviation judgment . . .'

"The Court states that the amount of its liability is to be determined under the terms of the reinsurance treaty. Therefore, the judgment for damages is also reversed and we cannot hold that the question of damages has been adjudicated by the appellate court.

"We are going to rule on what we consider to be the viable issues in this case and try to give you some direction where I think the lawsuit should go at this time. As we view it, the matter is before us on three basic issues. First of all a counterclaim upon which default judgment has been requested. Secondly, coverage under the reinsurance contract, and third, damages for breach of covenant. This is what we posture to be the three viable issues in the lawsuit." (A. 20-22.)

A copy of the Report of Proceedings of May 26, 1976, is incorporated into the Appendix hereto and designated as Appendix E.

In August of 1976, Respondent filed a Petition for a Writ of Mandamus in the Tenth Circuit Court of Appeals seeking a Writ of Mandamus to halt all proceedings in the District

Court. On January 14, 1977, after this Court had denied certiorari, the Tenth Circuit Court of Appeals entered an order, over the dissent of Chief Judge Lewis, granting the writ. In its order, Appendix A hereto, the court, in discussing its original opinion, stated:

> "We reversed a judgment so finding on the ground the notice provision was not clearly stated as a condition precedent and should be construed against the reinsurer. Therefore, we held the failure to give notice was only a breach of contract. On remand the trial court has set a hearing to allow presentation of evidence of damages for breach of contract."

The court then stated:

> "Perhaps the mandate should have been more specific."

The court then went on and sought to excuse its lack of specificity by stating:

> "The reason the opinion was not more specific in foreclosing any claim for damages under a breach of contract theory is that we were not informed until the petition for rehearing that Security had shown, could show, or desired to show any damages under this theory. We were not informed that Security desired a remand for this purpose."[1]

In conclusion, the court stated:

> "The question is whether the mandate is sufficiently clear so that any further proceedings violate the mandate and may be halted by mandamus, or whether the only remedy is a second appeal challenging Security's right to change its theory of the case and obtain a new trial on the issue of damages. We believe the mandate sufficiently indicates our intent. We remanded for the entry of judgment, not for further proceedings. The scheduled hearing should be considered a violation of the mandate.
>
> "The trial court is directed to enter a judgment reversing the case and in favor of Century Casualty Company."

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1. Apparently, the court misapprehended the theory upon which suit was brought, in that the Complaint expressly sought damages flowing from the breach of contract (Appendix C).

Chief Judge Lewis filed a dissent, wherein he stated:

> "I do not consider the issuance of a writ of mandamus as the proper remedy in this case and consequently dissent from the issuance of the writ. The writ should not be used to prevent possible error at the trial level nor to clarify, correct, or change a final decision of the court or its mandate." (A. 1-4.)

ARGUMENT.

It is respectfully submitted that the question presented for review falls squarely within the ambit of Supreme Court Rule 19(b), in that:

(1) The issuance of a Writ of Mandamus after term time, after denial of certiorari, and after the trial court had made substantive rulings within the framework of the original mandate, constituted a departure from the usual and accepted course of judicial proceedings so that this Court's supervision is required in order to prevent the circuits, and particularly the Tenth Circuit, from utilizing the extraordinary remedy of mandamus from becoming an acceptable substitute for orderly appellate procedures established pursuant to 28 U. S. C. A. 1291, and

(2) The basis upon which the writ was issued, as set forth in the order, is in direct conflict with the guidelines established by Supreme Court Rule 30, the opinions of this Court, and the decisions rendered in the other circuits.

It is well settled that mandamus may not be resorted to as a mode of review where a statutory method of appeal has been prescribed. By statute, Congress has granted jurisdiction to the Circuit Courts of Appeal only from final decisions of the District Courts. 28 U. S. C. A. 1291. However, once that jurisdiction has been exercised and the mandate has become final, as in the instant case, the jurisdiction of the Court of Appeals comes to an end. See *Bushnell* v. *Crooke Mining & Smelting Co.*, 150 U. S. 82, 14 S. Ct. 22, 37 L. Ed. 1007; *Dobson* v. *United States*, 31 F. 2d 288 at 288 (2nd Cir. 1929); *Watson* v. *Gallagher*, 202 F. 2d 641 at 641 (6th Cir. 1953); *Nachod et al.* v. *Engineering & Research Corporation*, 108 F. 2d 594 at 594 (2nd Cir. 1939).

Even though 28 U. S. C. 1651 enables the court to issue extraordinary writs, including a Writ of Mandamus, that author-

ity is limited to the issuance of writs only "in aid of its jurisdiction." Also see *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21 at 24, 25, 63 S. Ct. 938, 87 L. Ed. 1185.

It is respectfully submitted that the Court of Appeals in the instant case, having issued its mandate, lost jurisdiction over the matter and cannot, nor should they be permitted to, employ the extraordinary remedy of mandamus under the guise that its issuance is in aid of its jurisdiction, where the function actually performed by the writ was to recall the mandate for the purpose of modifying or altering it, and with the further purpose of preventing the District Court from exercising its discretion within the framework of the original opinion of the Court of Appeals.

Even assuming, *arguendo*, that the court had jurisdiction under 28 U. S. C. 1651, it is respectfully submitted that mandamus was not the appropriate remedy, and its issuance was in direct conflict with this Court as well as the decisions from the other circuits.

It is well settled that mandamus cannot be resorted to as a substitute for the statutorily regulated modes of appeal as established by the Uniform Rules of Appellate Procedure, and particularly, Rules 3 and 4. See *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21 at 27, 28, 63 S. Ct. 938, 87 L. Ed. 1185. Nor should it be employed as a means of circumventing the requirements of Rule 41 of the Uniform Rules of Appellate Procedure, which provides for the finality of mandates. In the instant case, it is clear, in that the Court of Appeals admitted in the course of its opinion granting the writ that its original opinion and mandate lacked specificity (A. 2), that the original opinion, including the mandate contained therein, gave discretion to the District Court in the manner in which it was to be implemented.

In *Ex parte Sawyer*, 21 Wall. 235, 22 L. Ed. 617 (1875, U. S.), this Court established the guidelines with respect to the employment of the remedy of mandamus in conjunction with its mandate, when it stated:

> "By the mandate already issued, we have required the circuit court to proceed with the execution of its decree in such manner as right and justice shall require. If the court refuses to proceed under that order we may, by mandamus, compel it to do so, but we have no power to control its discretion while proceeding. A superior court may by mandamus, set the machinery of an inferior court in motion, but when that has been done its power under that form of proceeding is at an end. The inferior court is supreme within its own jurisdiction so long as it is acting."

It is clear from the Report of Proceedings of May 26, 1976 (Appendix E), that the District Court, upon receipt of the opinion, set the machinery in motion to conduct further proceedings consistent with that opinion. It is respectfully submitted that once that was accomplished, the Court of Appeals could not bring a halt to those proceedings peremptorily by a Writ of Mandamus, but could only act on an appeal taken from the ultimate final decision.

The Court's attention is respectfully directed to the fact that the Court of Appeals, in its opinion, did not pretend to find any abuse of discretion by the District Court, nor did it find that the court was failing to carry out any ministerial function. In the absence of those findings, it is respectfully suggested that the issuance of the writ constituted an abuse of judicial discretion and a conscious disregard for established precedent controlling the employment of so drastic a remedy as mandamus.

Respectfully submitted,

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APPENDIX A.

NOVEMBER TERM—~~February~~ January 14, 1977

Before THE HONORABLE DAVID T. LEWIS, *Chief Judge*, and THE HONORABLE DELMAS C. HILL and JAMES E. BARRETT, *United States Circuit Judges*.

CENTURY CASUALTY COMPANY, *Petitioner*, *vs.* THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO and THE HONORABLE SHERMAN G. FINESILVER, one of the Judges thereof. *Respondents.*	No. 76-1707

This case is before the Court on a petition for a writ of mandamus. Petitioner seeks to halt any further proceedings in the trial court relating to a breach of contract in Security Mutual Casualty Co. v. Century Casualty Co., No. C-4311 (D. Colo., Judge Finesilver). Petitioner argues such proceedings are in violation of this Corut's mandate in a prior appeal, No. 74-1809, Security Mutual Casualty Co. v. Century Casualty Co. (March 12, 1976). Certiorari has now been denied in that case and Judges Hill and Barrett would grant the writ.

The case was originally tried and appealed on the theory that Century Casualty's failure to give notice to certain reinsurance claims constituted nonfulfillment of a condition precedent. We reversed a judgment so finding on the ground the notice provision was not clearly stated as a condition precedent and should be construed against the reinsurer. Therefore, we held the failure to give notice was only a breach of contract. On remand the trial court has set a hearing to allow presentation of evidence of damages for breach of contract.

Perhaps the mandate should have been more specific. In its entirety it reads:

> We reverse the judgment insofar as it holds Security Mutual is not liable under the reinsurance treaty for the Anderson Aviation judgment. The amount of its liability should be determined under the terms of the reinsurance treaty. Therefore, the judgment for damages is also reversed. Century Casualty has not appealed from the part of the judgment declaring that Security Mutual is entitled to terminate the reinsurance treaty, and it will be allowed to stand. We remand with directions to enter judgment consistent with this opinion.

By this mandate we intended to order the entry of a judgment finding that the reinsurance contract was binding and controlled the extent of Security's liability to pay the Anderson Aviation judgment. The failure to give notice was only a breach of contract which entitled Security to subsequently terminate the contract. Since the damages awarded were based on the condition precedent theory, the judgment for damages was reversed *in toto* with no provision for modification or for a new award based on another theory. We intended this to be a conclusive statement of the rights and liabilities of the parties and directed the entry of judgment incorporating our holding. We did not intend to authorize further proceedings.

The reason the opinion was not more specific in foreclosing any claim for damages under a breach of contract theory is that we were not informed until the petition for rehearing that Security had shown, could show, or desired to show any damages under this theory. We were not informed that Security desired a remand for this purpose.

The statement in the opinion relied upon to authorize a hearing on damages is as follows:

> Had Security shown any pecuniary injury from Century's failure to give them notice, we believe damages would have been an adequate remedy.

The statement was worded in the past tense and was intended to note that Security had the opportunity to present proof of such damages and chose not to do so. In its complaint Security alleged the failure to give notice was both a breach of contract and a failure of a condition precedent. Security pleaded no damages under a breach of contract theory and is clearly seeking to change its theory of the case on remand.

The question is whether the mandate is sufficiently clear so that any further proceedings violate the mandate and may be halted by mandamus, or whether the only remedy is a second appeal challenging Security's right to change its theory of the case and obtain a new trial on the issue of damages. We believe the mandate sufficiently indicates our intent. We remanded for the entry of judgment, not for further proceedings. The scheduled hearing should be considered a violation of the mandate.

The trial court is directed to enter a judgment reversing the case and in favor of Century Casualty Company.

The Clerk shall certify a copy of this order to the United States District Court for the District of Colorado, to the Honorable Sherman G. Finesilver, Judge thereof, and to the parties hereto, as the writ of mandamus of this Court which is hereby made absolute and shall issue forthwith.

Lewis, Chief Judge, dissents. The dissent is attached to this order.

/s/ HOWARD K. PHILLIPS
Howard K. Phillips
Clerk

A true copy
Teste

HOWARD K. PHILLIPS
Clerk, U. S. Court of Appeals,
Tenth Circuit
By /s/ LINDA A. HALL
Deputy Clerk

LEWIS, *Chief Judge*, dissenting.

I do not consider the issuance of a writ of mandamus as the proper remedy in this case and consequently dissent from the issuance of the writ. The writ should not be used to prevent possible error at the trial level nor to clarify, correct, or change a final decision of the court or its mandate.

APPENDIX B.

JANUARY TERM—February 14, 1977

Before THE HONORABLE DAVID T. LEWIS, *Chief Judge*, THE HONORABLE DELMAS C. HILL, *Circuit Judge* and THE HONORABLE JAMES E. BARRETT, *Circuit Judge*.

CENTURY CASUALTY COMPANY, *Petitioner*, *vs.* THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO and THE HONORABLE SHERMAN G. FINESILVER, One of the Judges thereof, *Respondents*.	No. 76-1707

This matter comes on for consideration of the petition for rehearing filed by respondents January 28, 1977.

Upon consideration whereof, the petition for rehearing is denied. Chief Judge David T. Lewis voted to grant the petition.

/s/ HOWARD K. PHILLIPS
Howard K. Phillips
Clerk

APPENDIX C.

IN THE UNITED STATES DISTRICT COURT
For the District of Colorado
Civil Action No. C-4311

SECURITY MUTUAL CASUALTY COMPANY,
Plaintiff.

vs.

CENTURY CASUALTY COMPANY,
Defendant.

COMPLAINT

Comes now the plaintiff, by its attorneys, White and Steele, Professional Corporation, and for complaint against the defendant states and alleges as follows:

1. The plaintiff, Security Mutual Casualty Company, is an Illinois corporation, with its principal place of business in Illinois. The defendant, Century Casualty Company, is a Colorado corporation, with its principal place of business in Colorado. The amount involved exclusive of interest and costs is in excess of $10,000.00. This Court has jurisdiction under 28 U. S. C. § 1332.

2. Insofar as this is an action for declaratory judgment, this Court also has jurisdiction under 28 U. S. C. § 2201.

3. Plaintiff is an insurance company engaged, among other things in that type of insurance business known an "reinsurance," or the acceptance or sharing of risks of other insurance companies on primary policies written by those other companies. The defendant is an insurance company which has engaged in the business of writing primary insurance policies. Plaintiff entered

into a reinsurance agreement with the defendant effective as of March 18, 1966, a copy of which is attached hereto as Exhibit "A", and which is herein referred to as the treaty. By virtue of this treaty, the plaintiff agreed to indemnify the defendant, in excess of defendant's retention and on the conditions specified therein, for aircraft passenger liability, aircraft property damage liability, and other types of risks. In 1969, the defendant entered into a primary insurance policy with Anderson Aviation Sales Company, Inc., a business enterprise in Phoenix, Arizona, engaged in the business of leasing airplanes to the public. The policy issued by the defendant to Anderson was at least colorably within the scope of the reinsurance treaty which is Exhibit "A" hereto.

4. On or about September 3, 1969, Anderson Aviation leased a plane to a person who, with five passengers aboard, crashed in the course of landing in the vicinity of Blythe, California, killing the pilot and five passengers, and totally destroying the plane.

5. Article VII, Exhibit "A" hereto, contains this paragraph:

> "The Company shall immediately give notice to the Reinsurer on all claims reserved in excess of the Company's retention and also shall give prompt notice to the Reinsurer on claims which, in the judgment of the Company could develop into losses involving reinsurance hereunder. Further, as respects bodily injuries, the Company shall report to the Reinsurer all claims involving fatalities, spinal cord damage, brain damage, extensive burns, multiple fractures or amputations, regardless of liability, where the policy limits (or Workmen's Compensation Benefits) applicable to such losses exceed the retention of the Company. Inadvertent omission in dispatching such notices shall in no way affect the liability of the Reinsurer under this Agreement, provided the Company informs the Reinsurer of such [sic] omission or oversign promptly upon its discovery."

6. Anderson Aviation first notified the defendant company of the accident, including the property damage and all fatalities, on or about September 18, 1969. By this date, within a few

days after the accident, the defendant was fully informed as to all of the fatalities. The only written report ever dispatched by the defendant to the plaintiff was a notice of a claim of a property damage loss to the plane itself, dated December 15, 1969. This notice did not report any bodily injuries or loss of life, or the existence of passengers. This report was only of a hull claim, and this hull claim was paid in the amount of $27,500.00 by the defendant company. Promptly upon receipt of defendant's report, plaintiff indemnified defendant in the amount of $12,500.00 pursuant to the treaty. The hull claim was wholly separate and apart from any death claims.

7. A civil action was brought in behalf of the deceased persons in the Superior Court of Arizona for Maricopa County, Arizona, against Anderson Aviation on or about September 12, 1969. The defense of that action was managed by the defendant Century Casualty, and the matter was tried in the month of January, 1971. Verdicts in favor of the plaintiffs were awarded in the total amount of $385,000.00.

8. Up to the time of the verdict in the Arizona litigation, the defendant company did not dispatch written notice to the plaintiff of the deaths or claims therefor as required by the treaty, nor did defendant inform the plaintiff in any way whatsoever of the existence of death claims or even of the fact of deaths related to the operation of any plane with which Anderson Aviation was connected. The plaintiff did not have actual knowledge of such events.

9. In preparing and trying the Anderson Aviation matter in the state court of Arizona, the defendant company, through its officers and counsel, was guilty of negligence and incompetence. The failure of the defendant to notify the plaintiff of the death claims precluded the plaintiff from having experienced counsel participate in the defense of the cause. The chief trial counsel chosen by the defendant was in fact disbarred on the eve of trial, and each of these events needlessly and wrongfully exposed plaintiff to unnecessary loss and risk of further loss.

10. The verdict against Anderson Aviation in the Arizona litigation included amounts which are in excess of the policy amounts defined in the policy between defendant Century Casualty and its insured, Anderson Aviation. Anderson Aviation has made demands upon Century Casualty for those amounts on the grounds of misconduct in handling the defense of the litigation, including, but not limited to the failure by the defendant to offer settlement within the policy limits.

11. Article VII of the reinsurance treaty, Exhibit "A" attached hereto, in addition to the paragraph quoted above also contains a paragraph as follows:

> "It is understood that, when so requested, the Company will afford the Reinsurer an opportunity to be associated with the Company, at the expense of the Reinsurer, in the defense or control of any claims or suit or proceeding involving this reinsurance, and the Company and the Reinsurer shall cooperate in every respect in the defense or control of such claim or suit or proceeding."

The defendant did not, in any way, give the plaintiff an opportunity to participate in the litigation or to request the opportunity to participate in the litigation.

12. Upon the completion of the Arizona trial, described above, the defendant for the first time made demands upon the plaintiff to undertake responsibility for the damages. Defendant Century Casualty was requested and refused to participate in the posting of any portion of the supersedeas bond; by virtue of the refusal of defendant to supersede the judgment of the trial court in Maricopa County, Arizona, the plaintiff has been required to post supersedeas bond in the amount of $308,000.00, and has had primary responsibility in the processing of an appeal which is now pending in the Court of Appeals in the State of Arizona. Additional supersedeas in the amount of $82,000.00 was posted by Century Casualty's insured, Anderson Aviation.

13. Article IX of the reinsurance contract, Exhibit "A" hereto, contains the following language:

> "The Reinsured will maintain legal reserves with respect to claims hereunder and the Company will furnish to the Reinsurer quarterly a list of outstanding claims in which the Reinsurer is interested, showing the amount of loss reserves set up by the Company in respect of both the gross amount and the Reinsurer's share of each and every claim."

Despite this clause, the defendant did not in fact maintain required legal reserves and did not in fact furnish to the plaintiff quarterly a list of outstanding claims covering the Anderson Aviation episode.

14. In the matters pleaded in the preceding paragraphs, the defendant has been engaged in a course of conduct which has been a breach of its covenants and responsibilities and a relinquishment of any rights which it might otherwise claim under the reinsurance agreement which is Exhibit "A" attached hereto. The defaults in the terms of the reinsurance agreement by the defendant constitute an authorization to the plaintiff to terminate the reinsurance treaty and such reinsurance agreement has been terminated and the plaintiff no longer has any obligation whatsoever to the defendant in connection with the Anderson Aviation episode. As to this matter there is no longer any binding obligation on the part of the plaintiff, because no part of the agreement is of any force and effect. The defendant has no rights whatsoever against the plaintiff with respect to the Anderson Aviation transaction.

15. The amounts expended by the plaintiff herein in pursuance of the appeal in the state courts of Arizona, and for bond, are in excess of $10,000.00.

WHEREFORE, the plaintiff prays for judgment as follows:

(1) That this Court enter its declaratory judgment determining that the plaintiff is not liable to indemnify the defendant under the treaty and has no obligation whatsoever to the defendant in connection with the Anderson Aviation death claims episode set forth in this complaint;

(2) That this Court enter its declaratory judgment that, notwithstanding any provision of the treaty, plaintiff is not liable to defendant for any amount in excess of the policy limits as defined in the policy between Anderson Aviation and Century Casualty;

(3) That this Court give plaintiff a money judgment for all damages, including but not limited to costs, transcripts, printing, bond premiums and attorneys fees and all other amounts expended or incurred in connection with the appeal in the Anderson Aviation matter in the state courts of Arizona;

(4) That this Court retain jurisdiction and give plaintiff a money judgment for any amount for which the plaintiff may become liable by virtue of the supersedeas bond posted in the Arizona appellate court proceedings described in this complaint;

(5) For the costs of this litigation and such other relief as is just and proper, including expert witness' fees.

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APPENDIX D.

[Argued August 20, 1975; Decided March 12, 1976;
Rehearing Denied April 5, 1976]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 74-1809

SECURITY MUTUAL CASUALTY COMPANY, *Plaintiff-Appellee*,
v.
CENTURY CASUALTY COMPANY, *Defendant-Appellant*.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D. C. No. C-4311)

Michael F. Scott, Denver, Colorado (Roger D. Bush and James H. Mosley, Denver, Colorado, on the brief), for defendant-appellant.

A. Denison Weaver (John E. Clough, Denver, Colorado, on the brief), for pliantiff-appellee.

Before LEWIS, *Chief Judge*, and HILL and BARRETT, *Circuit Judges*.

HILL, *Circuit Judge*.

Security Mutual Casualty Company, the appellee, brought this action seeking a declaratory judgment determining its rights and liabilities under a reinsurance treaty with Century Casualty Company, the appellant. Security Mutual also sought to recover damages incurred as a result of a judgment against Century's insured, Anderson Aviation Sales Company, Inc.

Security Mutual claimed it had no liability as reinsurer because Century Casualty failed to give timely notice of the fatalities and resulting claims involved in the Anderson Aviation litigation. The trial court held that, under the reinsurance treaty,

notice was a condition precedent to Security Mutual's liability to indemnify Century Casualty. The court found as a matter of fact that notice was not given and entered judgment for Security Mutual.

The two companies entered into the reinsurance treaty in March, 1966. Security Mutual agreed to reinsure a specified portion of Century Casualty's losses under its primary insurance contracts in return for a portion of the premiums. During 1969, Century Casualty insured Anderson Aviation, an Arizona corporation in the business of leasing airplanes to the public. The policy was within the scope of the reinsurance treaty. On September 3, 1969, an Anderson Aviation plane crashed in Blythe, California, killing the pilot and five passengers and destroying the plane. Suit was brought in the state court of Arizona on behalf of the passengers against the passengers' employer, the pilot, and Anderson Aviation. Anderson Aviation was held liable on the theory of negligent entrustment. The judgment, in the amount of $385,000 plus costs and interests, was affirmed on appeal. *Anderson Aviation Sales Co., Inc.* v. *Perez*, 19 Ariz. App. 422, 508 P. 2d 87 (1973).

Century Casualty received notice of the death claims and the claims for hull damage to the airplane shortly after September 8, 1969. Century paid the claim for damage to the airplane and submitted a reinsurance claim on December 1, 1969. Security Mutual paid the reinsurance claim two weeks later. Suit was filed on the death claims on September 12, 1970, but the trial court found Security Mutual received no notice of the deaths or lawsuits until April 27, 1971, after the verdict had been returned against Century's insured and the post-trial motions had been denied. Century Casualty provided the defense in the Arizona trial court, but requested Security Mutual's assistance in the appeal. Security posted $308,000 and Anderson Aviation posted $82,000 on the supercedeas bond. Security Mutual and Century Casualty cooperated in the unsuccessful appeal.

In the present action Security Mutual seeks to establish that it is not liable under the reinsurance treaty for any part of the Arizona judgment against Century Casualty's insured. It also seeks to recover its expenses in prosecuting the appeal from that judgment. The trial court in this case determined, as a matter of fact, that notice was not given as required by the treaty. The sole question on appeal is whether notice of the deaths and subsequent claims is a condition precedent to Security Mutual's liability under the reinsurance treaty. If it is, the judgment must be affirmed. We conclude it is not and therefore reverse the judgment.

We have been cited to only one case deciding whether notice from the primary insurer to its reinsurer is a condition precedent to the reinsurer's liability. In *Keehn* v. *Excess Insurance of America*, 129 F. 2d 503 (7th Cir. 1942), the court held notice of loss was a condition precedent under the terms of the contract there in dispute. *Keehn* was decided under Illinois law, and we do not believe Colorado law compels the same result. Moreover, every contract must be interpreted according to its own terms.

The Colorado cases cited by appellant involve primary insurance rather than reinsurance. In Colorado, notice of loss may be expressly made a condition precedent to an insurer's liability. *Barclay* v. *London Guaranty & Accident Co.*, 46 Colo. 558, 105 P. 865 (1909); *see Dairyland Insurance Co.* v. *Cunningham*, 360 F. Supp. 139 (D. Colo. 1973). However, a provision for notice will not be construed as a condition precedent unless that intention is clearly and unequivocally stated in the contract. *Connecticut Fire Insurance Co.* v. *Colorado Leasing Mining & Milling Co.*, 50 Colo. 424, 116 P. 154 (1911); *Preferred Accident Insurance Co.* v. *Fielding*, 35 Colo. 19, 83 P. 1013 (1905). The same rule is stated in 13 Couch on Insurance 2d § 49:20 as follows: "[S]tipulations for notice will not be construed as conditions precedent if reasonably open to another construction."

Before we may apply these rules of construction, however, we must attempt to determine the intent of the parties by interpreting the language of the contract. A court will not force an ambiguity in order to resolve it against an insurer. *Massachusetts Mutual Life Insurance Co.* v. *De Salvo*, 482 P. 2d 380 (Colo. 1971); *Southern Surety Co.* v. *MacMillan Co.*, 58 F. 2d 541 (10th Cir. 1932), *cert. denied*, 287 U. S. 617, 53 S. Ct. 18, 77 L. Ed. 536. The notice provision of the Security Mutual-Century Casualty reinsurance treaty states:

> The Company [Century] shall immediately give notice to the Reinsurer [Security] on all claims reserved in excess of the Company' [*sic*] retention and also shall give prompt notice to the Reinsurer on claims which, in the judgment of the Company could develop into losses involving reinsurance hereunder. Further, as respects bodily injuries, the Company shall report to the Reinsurer all claims involving fatalities, . . . regardless of liability, where the policy limits (or Workmen's Compensation Benefits) applicable to such losses exceed the retention of the Company. . . .

We do not believe this language plainly states a condition precedent. It is significant, in a contract as carefully drawn as an insurance contract, that none of the usual words indicating a condition precedent are present. *See Southern Surety Co.* v. *MacMillan Co., supra.* Perhaps more significant is the inclusion of language expressly designating compliance with another contract clause a condition precedent. The arbitration clause states, "[A]s a condition precedent to any right of action hereunder, the parties to this agreement shall submit the matter in dispute to arbitration." Certainly the omission of similar language from the notice clause is some indication it was not considered a condition precedent.

Security Mutual argues that the notice provision is expressly made a condition precedent by the following clauses in page one of the reinsurance treaty:

Witnesseth:

That in consideration of the mutual covenants hereinafter contained and upon the terms and conditions hereinbelow set forth, the parties hereto agree as follows:

ARTICLE I

POLICIES COVERED:

The Reinsurer hereby agrees to indemnify the Company in respect to the net excess liability which may accrue to the Company under its policies. . . .

. . . .

subject to the terms, conditions and limitations of this Agreement and of the Exhibits. . . .

Security points out that a similar clause was considered sufficient to create an express condition precedent in *Barclay* v. *London Guarantee & Accident Co., supra.* We agree that a catch-all conditioning clause at the beginning of a contract may be sufficient when all the clauses following are true conditions. In an ordinary insurance contract, like that in *Barclay,* this may often be the case. A primary insurance contract is essentially unilateral in nature. The entire relationship is based upon a promise and a condition. The insurer promises to pay a sum of money upon the happening of an uncertain and fortuitous event, conditioned upon the payment of premiums by the insured. The insured makes no return promise to pay the premiums and the other duties placed on the insured are usually stated as conditions rather than promises. 3A Corbin on Contracts § 731 (1960). We believe this explains the court's holding in *Barclay.*

In contrast, a reinsurance treaty is a contract for insurance, not a contract or policy of insurance. 19 Couch on Insurance 2d § 80:2 (1965). In a reinsurance treaty, the reinsured contracts to cede all or part of its risks to the reinsurer. The reinsurer contracts to accept the risks in return for a portion of the premiums. 13 Appleman, Insurance Law and Practice § 7681 (1945). A treaty is a bilateral contract containing mutual covenants. The Security Mutual-Century Casualty treaty

contains provisions, such as those pertaining to loss reserves and taxes and to commencement and termination of the contract, which appear to be covenants rather than conditions. We cannot say that a clause stating the agreement is made "upon the terms and conditions hereinbelow set forth" makes every provision in the succeeding 12 pages of the contract a plain and unequivocal condition precedent, especially when the clause also refers to "mutual covenants hereinafter contained."

In this regard, our case is closely akin to *Southern Surety Co.* v. *MacMillan Co., supra,* where the court found the word "provided," which usually indicates a condition precedent, had been indiscriminately used to introduce some paragraphs that might be conditions and others that might be covenants. The court held that the use of condition precedent language did not remove the ambiguity and resorted to the rules of construction to enforce the contract. We are likewise unable to determine the intent of the parties by interpreting the language of the contract and must apply the rules of construction.

We noted above that Colorado law does not favor construing ambiguous terms as conditions precedent. A construction as covenants rather than conditions is desirable because it avoids forfeitures. *Southern Surety Co.* v. *MacMillan Co., supra;* 13 Couch on Insurance 2d § 49:20 (1965). In addition, it has been held that any ambiguity in a reinsurance contract is to be resolved against the reinsurer unless the language is that of the original insurer. *Justice* v. *Stuyvesant Insurance Co.,* 265 F. Supp. 63 (D. W. Va. 1967). Applying these rules to the contract before us, we hold that the notice provision is a covenant by Century and not a condition precedent to Security's duty to make payment.

We believe our construction of the reinsurance treaty is consistent with the main purpose of the contract. The purpose of notice and proof of loss clauses in primary insurance contracts is to afford the insurer an opportunity to form an intelligent estimate of its liabilities, to afford it an opportunity to investi-

gate the claim while witnesses and facts are available, and to prevent fraud and imposition upon it. 44 Am. Jur. 2d Insurance § 1455 (1969). In reinsurance contracts, like the one before us, the investigation and defense of the claim is usually left to the primary insurer. Although Security was given the right to associate in the defense of claims, when it so desired, such participation was not so essential as it is for a primary insurer. Century had as much reason as Security to see that the death claims in Anderson Aviation litigation were properly investigated and defended. Between the two insurers, there was little danger of fraud or imposition. Had Security shown any pecuniary injury from Century's failure to give them notice, we believe damages would have been an adequate remedy. Our construction of the contract does not deny the reinsurer the protection it needs, and it does give the reinsured the security and returns for which it paid. *See* 1 Couch on Insurance 2d § 15:26 (1965).

Finally, we should emphasize the public policy considerations that support our judgment. The Colorado Commissioner of Insurance is charged with the duty of protecting the State's insurance-buying public. Colo. Rev. Stat. Ann. § 10-1-108 (1973). Pursuant to this duty, he must assure the solvency of insurers doing business in Colorado. This is accomplished primarily by requiring certain minimum capital reserves. However, Colo. Rev. Stat. Ann. § 10-3-118 (1973) provides that an insurer "may take credit for reserves on risks ceded to a reinsurer." In an *amicus curiae* brief filed in the trial court and incorporated in Century Casualty's brief before this Court, the Commissioner points out that the credit for reinsurance is necessary to keep many small but highly competitive companies in the insurance business. If this credit is to be allowed, the Commissioner must be certain the reinsurance will be available when a claim is made. In this regard, § 10-3-118(e) provides: "No credit shall be allowed for reinsurance where the reinsurance contract does not result in the absolute transfer to the reinsurer of the risk of liability".

For the Commissioner to accurately determine whether the transfer of liability is absolute or conditional, we think the language of the contract must be plain and unequivocal. To allow an insurer to obtain credit for reserves on a reinsurance contract that contains obscure conditions precedent, and then allow the reinsurer to subsequently deny liability, would substantially impair the function of the Commissioner of Insurance. Moreover, it would substantially increase the danger to the public. An apparently solvent insurer might be plunged into insolvency through its reinsurer's reliance on the nonperformance of an ambiguous condition precedent. If we require any condition that might result in forfeiture to be clearly stated, it will enable the Commissioner to accurately determine when a credit against reserves for reinsurance should be given. A different holding in this case would undermine the Commissioner's ability to ascertain the solvency of Colorado insurance companies.

We reverse the judgment insofar as it holds Security Mutual is not liable under the reinsurance treaty for the Anderson Aviation judgment. The amount of its liability should be determined under the terms of the reinsurance treaty. Therefore, the judgment for damages is also reversed. Century Casualty has not appealed from the part of the judgment declaring that Security Mutual is entitled to terminate the reinsurance treaty, and it will be allowed to stand. We remand with directions to enter judgment consistent with this opinion.

APPENDIX E.

IN THE UNITED STATES DISTRICT COURT
For the District of Colorado
Civil Action No. C-4311

SECURITY MUTUAL CASUALTY COMPANY,
Plaintiff,
vs.
CENTURY CASUALTY COMPANY,
Defendant.

REPORTER'S TRANSCRIPT
COURT'S RULING

Proceedings before the Honorable Sherman G. Fincsilver, Judge, United States District Court for the District of Colorado, beginning at the hour of 10:30 a.m. on the 26th day of May, 1976, in Courtroom D, United States Courthouse, Denver, Colorado.

Appearances:

John E. Clough, White & Steele, Attorneys at Law, 1660 Lincoln Center Building, 1660 Lincoln Street, Denver, Colorado, A. Denison Weaver, Attorney at Law, One IBM Plaza, Suite 4015, Chicago, Illinois, and Robert Hanham, General Counsel for Security Mutual, appearing on behalf of the plaintiff.

James H. Mosley, Mosley, Wells & Dean, Attorneys at Law, 1230 Colorado State Bank Building, Denver, Colorado, and Michael F. Scott, Attorney at Law, 12075 E. 45th Avenue, Suite 135, Denver, Colorado, appearing on behalf of the defendant.

Proceedings:

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The Court: I think I am prepared to rule at this time and I would like to give you some direction as to where I think the case is right now. I have reread the briefs that were submitted to the Tenth Circuit. The Court has read the Opinion in clear detail and also the Motion for Rehearing and we cannot draw any conclusion as to what the Tenth Circuit meant by their silence in not granting the Motion for Rehearing. It is only one occasion in perhaps a thousand where rehearing is granted. I do not draw any conclusion from the fact they did not grant a rehearing or did not amend their adjudication.

There are several areas of the slip opinion which was rendered by the Circuit on the 12th of March that I think supports and underscores this Court's view that the amount of damages is still viable in this lawsuit that the plaintiffs are entitled to. On page 8 of the Opinion, the third line from the top, it states:

> ". . . A treaty is a bi-lateral contract containing mutual covenants. The Security Mutual-Century treaty contains provisions, such as those pertaining to the loss reserves and taxes and to commencement and termination of contract, which appear to be covenants rather than conditions . . ."

They construe that aspect there, please, that these are merely terms of conditions rather than conditions precedent.

On page 9:

> ". . . Applying these rules to the contract before us, we hold the notice provision is a covenant by Century and not a condition precedent to Security's duty to make payment."

On page 10, the first full sentence, they state:

> ". . . Century had as much reason as Security to see that the death claims in Anderson Aviation litigation were properly investigated and defended. Between the two insurors, there was little danger of fraud or imposition. Had Security shown any pecuniary injury from Century's failure to give them notice, we believe damages would have been an adequate remedy . . ."

The fact that they used a past tense does not lead us to the conclusion that matter has been adjudicated by the appellate

court other than if there was a failure to give notice as required and there is found to be a breach of the treaty which we found and any damages that can be established to naturally flow from the breach of the covenant are recoverable. That is how we interpret the Opinion.

The last paragraph in the Opinion states:

> "We reverse the judgment as it holds Security Mutual is not liable under the reinsurance treaty for the Anderson Aviation judgment . . ."

The Court states that the amount of its liability is to be determined under the terms of the reinsurance treaty. Therefore, the judgment for damages is also reversed and we cannot hold that the question of damages has been adjudicated by the appellate court.

We are going to rule on what we consider to be the viable issues in this case and try to give you some direction where I think the lawsuit should go at this time. As we view it, the matter is before us on three basic issues. First of all a counterclaim upon which default judgment has been requested. Secondly, coverage under the reinsurance contract, and third, damages for breach of covenant. This is what we posture to be the three viable issues in the lawsuit.

The motion by defendant filed on April 23rd, 1976, for default judgment on the antitrust counterclaim is denied. We find that the defendant has delayed prosecution for such a long time that default judgment is not warranted. Additionally, we find bifurcation of the counterclaim from the basic insurance claims created some ambiguities in procedure which may have contributed to the failure of plaintiff to file an answer to the counterclaim prior to the present time. So we expressly are denying any Motion for Default Judgment on the antitrust counterclaim. Discovery on the antitrust counterclaim is to proceed expeditiously and is to be completed within 45 days.

Pre-trial conference on this and any other outstanding issues is set for July 27th at 1:30 and counsel are to meet in advance

thereto and formulate a proposed pre-trial order with the attitude that reflects the interpretation that this Court gives to the viable issues.

With respect to the remaining two issues, the amount of the reinsurance coverage and damages for breach of covenant, we find pursuant to the mandate entered on the 22nd of April after the Petition for Rehearing was denied, that the defendant is fully covered by the reinsurance contract, that the defendant is covered by the contract during the applicable period. The remand should determine the exact amount of coverage and we are of the view and of the desire to avoid needless duplication of the original trial testimony and exhibits insofar as possible and we are of the view that there would only have to be a minimum of discovery on this matter. To this end, counsel for the defendant is to file within 20 days, a concise, abbreviated statement of position with respect to the amount of coverage, and such statement is to refer to trial testimony since we do have a record that was lodged with the Circuit Court and it's been, I imagine, refiled with our Clerk. Also there shall be reference to the exhibits. Defendants are to state with particularity the items of coverage and support therefor.

Counsel for the plaintiff is to respond with a similar statement of position 20 days thereafter. Defendant is to file within 10 days thereafter any reply together with a proposed order in regard to the extent of coverage under the treaty. In like manner plaintiff is to file a proposed order when it completes its briefing within 20 days after the initial filing by the defense. We are of the view that in this phase of the case that discovery should be completed again within a period of 45 days if necessary and only essential discovery shall move forward. I do not anticipate broad based discovery on this aspect.

In regard to the remaining area, the amount of damages, plaintiff is directed to file a statement of position with respect to the damages with specificity and particularity for the breach of the covenants within 20 days and I realize counsel have difficult trial

schedules and so on by the Court. However, this case is going to move forward, gentlemen. It is never going to be fresher in your mind as it is right now and this case commands expedition on the part of counsel and on the part of the Court. The plaintiff is to file a statement of its position with respect to the damages with specificity and particularity for the breach of the covenant within 20 days. It is to be concise and abbreviated and shall state with particularity the items of damage, reference to original trial testimony and exhibits insofar as they appear in the record. Counsel for defendants on these items of damages are to reply with a similar statement of position within 25 days thereafter and refutation of any items of damages together with a proposed order should you prevail on your view as to what damages, if any, should be awarded and the plaintiff as the movant in this area is to respond within 10 days with its proposed order. Likewise discovery on this issue of damages, if necessary, shall be moved forward within 45 days.

Mr. Clough: That would bring us over the 16th of July. You have stated that we should file our statement in 20 days. If we have 45 days for discovery, that extends over that time.

The Court: I recognize that fact. There might have to be a modification. The Court will take a look at that. I don't know how much discovery is necessary. However, I would like to know counsel's present posture in regard to the question of damages that is going to narrow the scope of discovery. The Court will, I believe, in this way narrow the issues down as to what we think are—what type of evidentiary trial will be necessary; how the antitrust complexion fits into the remaining issue.

The Court has already set the 27th of July as the date for the pre-trial on the antitrust phase of the case. The Court will also give counsel some direction prior to that time as to what we consider to be the ambit of the remaining issues in this case, the amount of the reinsurance coverage and the amount of damages. So in effect we will give you again today areas to concentrate on probably toward the middle of July so that this can

be embodied into the pre-trial order. The Court intends to try to move forward on this case. Apparently there is not unanimity of though as to what the Circuit did hold by counsel. There are varied interpretations and the Court has tried to give the clearest and fairest meaning that we can at this juncture without starting the lawsuit all over again. I think that one facet—I believe this Circuit did establish that we have affirmed this Court's finding that notice was not given. That notice as required was not given. They, however, have considered this merely as a breach of one of the contractual provisions, not as a breach of covenant.

Mr. Clough, do you have any questions?

Mr. Clough: On the discovery, I can report to Your Honor as to that stage at this time and perhaps ask a question of counsel. We have received various motions, requests for production of documents. We have received requests for admissions. We have received notices of deposition of some 18 people who are described as being officers or directors of the company. I had a discussion with counsel on that and there were three different days scheduled for deposition, the 2nd, 3rd and the 8th of June. I had discussion with counsel and told him that there were some who were no longer with the company. I would have no control and gave him those names. I told him that I felt that the information sought in the notices —they asked for 22 or about 24 pieces of information, if we had financial transactions or communications with any of these named companies, these respondents. We agreed and there was a letter hand-delivered to me by Mr. Scott that if we can by telephone find this information out as to whether or not they had information on these aspects and handle it by way of interrogatories on that aspect, they would look at the answers and decide then whether or not they wanted to go forward at anytime in the future on depositions. I went to Chicago last week and conferred all day with Mr. Hanham who is the general counsel. He gave me all the documents that we have to produce

and we will produce those or make them available for copying. There are quite a bit. I will file the responses to the requests for admissions. I think we have about three or four objections, but everything else we are giving answer to. We are answering and responding to all the other documents, all the other requests and will have that filed today or tomorrow. Most of the answers, I can state to counsel, on the notices of deposition are that most all of them have no affirmative response. They had no financial transactions or any communications dealing with any aviation insurance or anything related to the Counterclaim, and therefore we would feel that this deposition should not be taken. Now, they may wish to look at the antitrust claim. If they want to take a deposition, we can decide then whether or not we file a motion for protective order if they would not agree that, one, that the deposition not be taken or, two, if they are to be taken that they be taken in Chicago. We would be willing to go out there. I would be willing to go out on the 8th. I am sorry. I cannot go out then. I have already a pre-trial conference and motion on the 2nd and 3rd and I will be in the middle of trial unless it settles on the 8th, but I would be willing to set another date very close thereto and have all those depositions taken that they wish to have taken.

I would like an expression if I could now. Obviously they can't say we can't make our mind up until we see those answers. That is the situation. I will file that stuff this afternoon and make them available to them at any reasonable time. I would ask that we do take the depositions in Chicago, if they wish to continue with that, and that we set it at a different time convenient to counsel.

Mr. Scott: Your Honor, in response to that particular inquiry, I think that the issues have been broadened now concerning what the defendants were anticipating would be issues which they would be interested in discovering. I think at this time it would probably be necessary for us to reconsider and maybe even

we may want to delete some of the witnesses we have asked and we will certainly let them know immediately so they won't be inconvenienced. We might want to include some additional parties because of the issue of damages to complete our discovery on that particular issue. As far as making additional plans to go to Chicago, I have scheduled 40 depositions for the month of June of which about 18 are in this case and I don't know whether I would have time to get out there. I would prefer they be taken here, if possible, if we can work something out. We will be more than happy to. I would hate to see an order directing that we must go to Chicago to take the depositions because of the tremendous scheduling problems for I am sure Mr. Clough has got a heavy schedule also and so do I. I am sure Mr. Mosley does too.

The Court: I want to try to prevent any enth hour motions for protective orders and have counsel getting together and hearing your expression and have to get pretty much—we have to do it on the run while we have the leisure of everyone here now and knowing it is going to be hectic for the next 45 days to bring this case within the timetable the Court has set. I am hopeful you can make some arrangements as to who will give a little bit so you will not add to the cost of litigation and ask for more court time in which to resolve these matters.

Mr. Scott: The problem with going to Chicago in the event is a refusal to answer or to allow discovery, then we must travel back to Denver in order to obtain an ruling on it and that is one of the reasons that we've elected to or we prefer to cite Denver, Colorado, as a location for the depositions.

The Court: Are there any that you are going to depose in Chicago anyway?

Mr. Scott: In this particular case?

The Court: Aren't there some people in Chicago who reside in Chicago?

Mr. Scott: We had no intention of taking any depositions in Chicago.

The Court: Anything else, please?

Mr. Scott: Yes, Your Honor. In regards to—it was my understanding and I am sure that the Court having already ruled—but I felt I would have an opportunity to argue our Motions for Summary Judgment and for Default pursuant to the Minute Order that had entered. If the Court feels it would be beneficial, I would be more than happy to present my argument.

The Court: The Court has been through this file I dare say more times than counsel has. I don't want to short change anyone in regard to oral argument. However, this Court is satisfied that there is a firm—there is a firm foundation in regard to the Court's ruling on the antitrust claim and I don't believe in the interest of fair play, enter default judgment several years later on the counterclaim dealing with antitrust while this Court—nothing has been said about it for several years. I don't intend to go any further in regard to that, counsel.

Mr. Scott: Well, with regard to the Motion for Summary Judgment, we've seen no triable issue presented by the plaintiffs. We have no affidavit in opposition anf if there is something that we have missed or some specific finding of fact that the Court has as to what triable issue remains, it may be helpful.

Now, in the Motion for Summary Judgment of Costs—

The Court: Counsel, I am not going to broaden any ruling at this time. No doubt as we follow the timetable that we have here, there is going to have to be a supplemental pre-trial order entered by the Court at which time the Court will go into more detail as to what we feel would be the format to accomplish what I think are the issues. I will not broaden anything further.

Mr. Scott: One thing that I would like to bring to the Court's attention is to see if the Court feels it should enter a stay on the Motion for Damages filed by the plaintiff until such time as we can get an order from the Tenth Circuit Court clarifying its Opinion.

The Court: Counsel, I will not grant any stay. I would deny any interlocutory appeal. You have other remedies to

take if you want to take them. I think this litigation has to move forward and I am not going to stay on this Order nor am I going to grant an interlocutory appeal. If counsel are of the view that you want to take any other appropriate action, counsel may proceed under the Rules of Civil Procedure.

Mr. Scott: Thank you, Your Honor.

The Court: I am anticipating that the discovery that remains in this case is going to be undertaken in good faith and not with a harassing and vexatious attitude. I would ask counsel that if you cannot come to grips as to the ambit of discovery and you feel you have got an arguable point or something very well the Court within its discretion could order you to do, I would suggest that you file your motion for protective orders, but go ahead and proceed with the attitude of cooperation and at trial renew your request for appropriate sanctions by way of attorney's fees or reimbursement of costs or striking of any pleadings so that we are not going to break stride by any motions for protective orders. I am underscoring the fact that I am hopeful that counsel will cooperate in the balance of discovery in this case. This Court with great repetity has been assessing costs against attorneys in regard to what I consider to be not within the harmony of discovery under Rule 37 and am hopeful it will not become necessary in this case. If it is something the Court can ask you to do, do it. If it is going to add to the cost of litigation, it is not going to be done in good faith. File your motion for protective orders, but let's not ask to have it set down until the time of trial and so the Court can address itself to all these matters if there are questions that the witness shoudn't answer, I think you know the general idea that the Court is going in right now. I suggest you do this with great reservation so that any discovery is going—will go forward in a very expeditious way. I am hopeful that you will be able to work out the question whether the depositions should be here in Denver or Chicago. If the Court has to address itself, the Court will, you understand. However, I am asking counsel within

your own schedules to try to work the details out. If you are not happy, file your motion for protective orders and we will determine that at the time of trial and the Court will determine at trial whether it was necessary to even take the deposition. If there is some question whether it should have been taken or whether it was necessary under the trilogy of issues that are, I think, still left in the lawsuit.

Do you understand the Court's observation?

Mr. Clough: Yes, Your Honor.

Mr. Scott: Yes, Your Honor.

I have one further matter. As long as we are present and in court, Mr. Clough has indicated he did have some objections to requests for admissions or production. He had two objections to our requests for admissions also. Maybe we could learn what those are at this time and see whether we would—if we have any objection with them and maybe we could get a ruling at this time.

Mr. Clough: I haven't filed them yet. If we are going to get a—I have a Motion for Protective Orders, if you want to do that now. I understand Your Honor's statement and I will try to do what I can.

The Court: Let's not go into an elongated hearing on these matters where counsel do not anticipate this. Since Mr. Weaver is here, he has some familiarity with this file and also with the client in Chicago. I suggest that perhaps counsel could spend a few minutes now in the conference room and see if you can't narrow the issues down just a little bit so you will not have to file any motions.

I will ask the attorneys to approach the bench if they will, please.

(Discussion off the record at the bench.)

The Court: The Court is going to direct that counsel continue and also to see representatives of the State Office and the Attorney General's Office to continue to explore the possi-

bility of settlement if this can be done without doing violence to the legal position of the parties or violence to what they feel is the degree of propriety that should attach to this litigation. However, as the Court has mentioned, we had from the same Opinion—we have several different interpretations as to what the mandate means and this lends itself to further appeal of this case and further litigation and the Court would frankly suggest to counsel that they continue with some efforts to see if this case can't be settled. The Court will not become involved with any settlement discussion nor do I want to know any terms of negotiations. The Court would care to be advised by the close of business next Tuesday, which is the 1st of June, as to the prospects toward settlement.

Mr. Clough, I will ask you to merely send a letter to the Court that settlement discussions have gone forward and what the prospects appear to be. I would ask you please not to refer to any figures or terms or conditions, please, and a copy of your letter should go to the Insurance Commissioners, the Attorney General's Office and defense counsel.

Mr. Clough: Yes, Your Honor.

The Court: Is there anything further at this time, please?

Mr. Clough: Just one other matter. Since you have denied the Motion for Default Judgment, if Your Honor would informally accept our Answer which we have filed—

The Court: The Answer will be duly filed as being an Answer to the Counterclaim.

Mr. Mosley: One other thing, if the Reporter would submit to us the comments of the Court which have to do with the time schedules.

(This matter in recess at 11:24 a.m.)

REPORTER'S CERTIFICATE.

I, E. J. Carpenter, Certified Shorthand Reporter and Official Reporter to this Court, do hereby certify that I was present

at and reported in shorthand the proceedings in the foregoing matter; that thereafter my shorthand notes were reduced to typewritten form under my supervision, comprising the foregoing official transcript; further, that the foregoing official transcript is a full and accurate record of the proceedings in this matter on the date set forth.

Dated at Denver, Colorado, this 18th day of June, 1976.

My Commission expires December 4, 1977.

/s/ E. J. CARPENTER
E. J. Carpenter
Official Reporter